In the

Supreme Court of the United States

October Term, 1966

No.

[illegible] Petitioner

vs.

The State of Washington, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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STANDARD OIL COMPANY OF CALIFORNIA, *Petitioner*,

vs.

THE STATE OF WASHINGTON, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

TO: The Chief Justice and Associate Justices of the Supreme Court of the United States

Your petitioner, Standard Oil Company of California, respectfully prays for the issuance of a writ of certiorari to the Supreme Court of the State of Washington to review a judgment of that court entered December 5, 1960, reversing a judgment for petitioner of the Superior Court of the State of Washington in and for Thurston County, Washington. Upon such review petitioner will request this court to reverse the judgment of the Supreme Court of Washington so as to affirm and require the enforcement of said Superior Court judgment, insofar as it requires the refund to petitioner of a tax imposed upon the transportation by petitioner of its products from its tank farms to its bulk plants in said state which products had been previously transported by petitioner from outside the state in interstate commerce to said tank farms.

The certified record in this case, including the entire proceedings in said Superior Court and said Supreme Court, is furnished herewith in accordance with Rule 21 of the Rules of this court.

OPINIONS BELOW

The Washington Supreme Court opinion (not yet officially reported) is reported unofficially at 156 Wash. Dec. 754 and at 355 P.(2d) 349 (Appendix A, p. 1A). The trial court's opinion (Superior Court of Thurston County, Washington) is unreported (Appendix B, p. 11A).

JURISDICTION

This action was brought under Section 12 of Chapter 9, Laws of Washington, First Ex. Session 1951, pages 28 and 29, being RCW 82.32.180 (Revised Code of Washington, cited RCW; Appendix C, p. 14A) to recover taxes imposed pursuant to a Washington statute, the application of which petitioner challenged (among other grounds) as repugnant to the Commerce Clause of the Federal Constitution (Article I, Section 8, Cl. 3). The opinion and judgment of the trial court granted judgment to petitioner on the ground that the statute under which the state taxed petitioner was not applicable to the distributions which were taxed. Therefore it was not necessary to, and the trial court in accordance with established practice[1] did

[1] *State ex rel. Lindsey v. Derbyshire*, 79 Wash. 227, 140 Pac. 540 (1914) at page 240 approved this quote from Cooley, Constitutional Limitations (6th Ed.), p. 196:

"No court will gratuitously pass upon a constitutional question or decide a statute or any part of it invalid.

"In any case, therefore, where a constitutional question is raised,

not rule upon the federal question presented by this petition (Opinion — Appendix B, p. 11A). Judgment pursuant to said opinion was entered June 29, 1959 (Appendix D, p. 16A).

On appeal the Supreme Court of the State of Washington held said statute applicable to the distributions which were taxed, and further upheld the validity of the statute against petitioner's challenge that the *application* of the statute was repugnant to the Commerce Clause of the Federal Constitution (Article I, Section 8, Cl. 3). The opinion of the Supreme Court of the State of Washington was issued September 22, 1960 (Appendix A, p. 1A). As permitted by Supreme Court Rule on Appeal 50 (RCW, Vol. 0, p. 28) (Appendix J, p. 25A), a petition for rehearing was timely filed on October 20, 1960, which petition was denied December 5, 1960 and the judgment herein sought to be reviewed was then entered on December 5, 1960 and became final (Appendix E, p. 18A and Appendix F, p. 20A). As shown by the certified record filed with this petition the Supreme Court of the State of Washington on December 6, 1960 entered its order to stay the judgment for ninety days from December 5, 1960 and on December 12, 1960 entered its order for certification of the record to the Supreme Court of the United States.

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though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arising which cannot be disposed of without considering it and when consequently a decision upon such question will be unavoidable.'"

This court has jurisdiction to grant this Petition for Certiorari under 28 U.S.C., § 1257 (3) which authorizes this court to review a final judgment rendered by the highest court of a state where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution of the United States, or where any right, privilege or immunity is claimed under the Constitution.

QUESTION PRESENTED

Is the tax which is measured by the full value of the products, imposed by RCW 82.04.270 upon the distribution of its products by petitioner from its tank farms in Washington to bulk plants in said state, invalid as being repugnant to the Commerce Clause of the Federal Constitution. (Article 1, Section 8, Cl. 3) when such products owned by petitioner are shipped by it into the State of Washington in movement from California or other states pursuant to accurately estimated demands for future sales and stored at said tank farms prior to delivery to said bulk plants? (Said tank farms are major receiving points with large storage facilities receiving said petroleum products directly from outside Washington. After storage at said tank farms the products in question are distributed to petitioner's bulk plants for storage and further distribution therefrom.)

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The taxing statute involved is Section 47 of Chapter 389, Laws of Washington 1955, pages 1671 and 1672.

being RCW 82.04.270. It is quoted in part below, and is set out verbatim in Appendix G, p. 21A.

The imposition of the taxes sought to be recovered in this action is claimed by petitioner to be in violation of and repugnant to Article I, Section 8, Cl. 3 of the Constitution of the United States reading:

> "POWERS OF CONGRESS. The congress shall have power * * *
>
> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;".

STATEMENT OF THE CASE

This was an action by petitioner for refund of an excise tax assessed by the Tax Commission of the State of Washington upon the transportation of petitioner's own petroleum products (shipped by petitioner in interstate commerce from outside the state to tank farms in this state), the tax being on the transportation from said tank farms, located usually at or near salt water in Washington, to petitioner's bulk plants located at various points in Washington. The tax was imposed under Section 47 of Chapter 389, Laws of Washington 1955, pages 1671 and 1672, RCW 82.04.270 (Appendix G, p. 21A) which imposes an excise tax on the privilege of distributing " * * * articles of tangible personal property, owned by them (the taxpayer) from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, * * * ." (Parenthetical words supplied)

The facts relevant to this taxed transportation

(which petitioner claims is a continuation of the interstate transportation originating when the products involved were initially shipped from outside the State of Washington) are succinctly stated in the following findings of the trial court (Findings of Fact, pp. 2, 3, 5—Appendix K, page 26A):

III

"Standard during the period covered by the assessment in question engaged in the distribution and sale of petroleum products in the State of Washington. All of said petroleum products except as provided in Stipulation of April 28, 1959, plaintiff's Exhibit Q, were shipped into the State of Washington in movement from California or other states pursuant to accurately estimated demands for future sales. After storage at terminals the products in question were distributed to Standard's bulk plants for storage and further distribution therefrom, Standard, during the period in question, owned and operated terminal storage plants or tank farms, which are major receiving points with large storage facilities and which received petroleum products directly from outside Washington. * * *

IV

"The Tax Commission Assessment and the Tax here in question related to the *distribution* of petroleum products by Standard from terminal storage plants in this state to such bulk plants in this state to the extent that such products were later delivered from such bulk plants to consumers such as government agencies, commercial, agricultural and industrial customers and to vessels. * * * " (Emphasis supplied).

VI

"The petroleum products in question were at all times owned by and at the risk of Standard until they were sold for resale or until they reached the ultimate consumer. * * * "

Respondent agreed these findings were correct, as appears from statements made on pages 6 and 8 of its brief to the Supreme Court (Appendix H, p. 23A).[2]

As noted above the tax here involved is on the transportation of petroleum products from said tank farms to the bulk plants. The statute expressly so states and respondent so agreed at page 8 of its brief to the Supreme Court, wherein it stated:

"The privilege taxed in the case at bar is the distribution from respondent's terminals to its bulk stations."

As will be more fully developed herein such products while being moved from outside the state through such tank farms to the bulk plants have been conclusively held to be at all times in interstate commerce. (*Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1950), in the course of which opinion this court determined that petroleum products shipped from outside a state remained in interstate commerce notwithstanding such storage at tank farms in the course of distribution and sale.)

It is the basic position of petitioner that the Commerce Clause is infringed by the tax here involved,

[2]The small amount of products not subject to the immunity from tax herein claimed is described in Exhibit Q, said small portion being received from refineries within the State of Washington. This amount is identified in said exhibit and is not involved in the issue presented on this petition.

since it is an unapportioned tax directly imposed on the privilege of moving petitioner's products while still in interstate commerce. The tax is measured by the whole value of the product. This tax is not even apportioned with respect to the value of the property in relationship to the extent of transportation in the State of Washington as compared to the entire interstate transportation from source to destination. If the tax were upheld, then Washington could tax 100% of the value of the property for the privilege of the continuance of its interstate journey while in the State of Washington; and California, for instance (from which most of the products came and within whose borders the product therefore also moved), could also impose a similar tax on 100% of the value.

STAGES AT WHICH THE FEDERAL QUESTION WAS RAISED

In the complaint on appeal from the ruling of the Tax Commission, as shown in the excerpt quoted at Appendix I, p. 24A, and at the trial of the action by argument and on brief, petitioner urged that the tax here involved was unconstitutional as applied to the transportation of petroleum products to bulk plants from tank farms when such products were shipped by petitioner from outside the state. The trial court found (Opinion—Appendix B, p. 11A) that the tax in any event was inapplicable to the transportation from tank farms to the bulk stations, since the bulk stations were not "retail stores or outlets" within the meaning of RCW 82.04.270 and therefore the trial court did not

find it necessary to rule on the alleged constitutional ground of recovery.[3]

The respondent, the State of Washington, appealed to the Supreme Court of the State of Washington from this interpretation of "retail stores or outlets" and petitioner, having the right to do so,[4] again urged (Brief of Respondent, pp. 103-136), as a ground of sustaining the trial court's opinion (in respect to the tax on the transportation of the products shipped into Washington) the unconstitutionality of the application of the tax in the face of the Commerce Clause. The Supreme Court having found that petitioner's bulk plants were "retail stores or outlets" proceeded also to pass upon this constitutional point and, as hereinafter more fully set forth, found against petitioner on this alleged ground of recovery (Opinion, Appendix A, p. 8A). This court will accept the recognition by the highest court of the state, that the constitutional issue was properly raised in the state court. *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185 1945).

ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The issue here presented is of tremendous importance not only to petitioner, but all of the oil companies engaged in bringing petroleum products into the State of

[3] See note 1 *supra*.

[4] "We are committed to the rule that we will sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof. *Guerin v. Thompson*, 53 Wn.(2d) 515, 519, 335 P.(2d) 36 (1959)." *Lundberg v. Corporation of Catholic Archbishop*, 55 Wn.(2d) 77 at 85, 346 P.(2d) 164 (1959).

Washington and other states, and therein distributing such products. All of them utilize tank farms and transport to bulk plants in the same manner as petitioner. Representatives of many of the oil companies doing business in the State of Washington appeared in the initial hearings before the Tax Commission of the State of Washington prior to petitioner's appeal to the Superior Court of the State of Washington for Thurston County[3], and counsel for several of the oil companies affected appeared as *amicus curiae* in the Superior Court and in the Supreme Court and by permission were allowed to argue and participate on brief (See Judgment, Appendix D, p. 16A and Notice of Order Denying Rehearing, Appendix E, p. 18A).

Most of the petroleum products consumed in the State of Washington (and most other states) are brought in from outside the state by various oil companies and stored at similar tank farms as here involved, and thereafter distributed to similar bulk plants for ultimate distribution and sale. As noted above the tax here involved is imposed directly on the privilege of this transportation from the tank farms to the bulk plants. If this tax is upheld it will authorize throughout the United States a similar such unapportioned tax on similar transportation originating outside the state of ultimate consumption, not only of petroleum products but of all types of property. This court, we believe, can

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[3]As shown by Exh. P-4 notice of the ruling of the Tax Commission was mailed to: Tidewater Associated Oil Co., Union Oil Co. of California, Standard Oil Co. of California, Shell Oil Company, The Texas Company, Richfield Oil Corporation, General Petroleum Corporation and certain of the attorneys for said oil companies.

take judicial notice of the fact that state taxing authorities and legislative draftsmen take advantage of any crack in the legal rule against the resurrection of state customs barriers. If the published decision of the Supreme Court of the State of Washington is allowed to stand, it may be safely assumed that many similar unapportioned taxes on transportation will be enacted in other states.

As stated in *Central Greyhound Lines v. Mealey*, 334 U.S. 653 at 662 (1947), in striking down an unapportioned tax on interstate commerce:

> "This being so, to allow New York to impose a tax on the gross receipts for the entire mileage—on the 57.47% within New York as well as the 42.53% without, would subject interstate commerce to the unfair burden of being taxed as to the portions of its revenue by states which give protection to those portions, as well as to a state which does not. * * * But if neither Pennsylvania nor New Jersey sought to tax their proportionate share of the revenue from this transaction, such abstention would not justify the taxing by New York of the entire revenue. *Freeman v. Hewit*, 329 U.S. 249, 256. By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.' *Id* at 253. The vice of such a tax is that it lays 'a direct burden upon every transaction in (interstate) commerce by withholding, for the use of the state a part of every dollar received in such transactions. *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 297'."

So in the instant case the tax on the full value of the product without apportionment as to the extent of its transportation within the State of Washington must be held invalid under the doctrine of the *Central Greyhound Lines* case. The Washington statute furnishes no basis whatsoever for apportionment, and in fact by its terms precludes it. It cannot be sustained *in part* as was done in the *Central Greyhound Lines* case because there apportionment was found feasible.

Under the holding of this court in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1950) said products remained directly in the course of interstate commerce from the tank farm storage to (at least) said bulk plants. The tax on such distribution is therefore a direct burden upon such interstate commerce. In summary:

1. The tax is on the movement of the property.
2. The movement is directly in interstate commerce which does not terminate until (at least) the property reaches the bulk plants, and
3. The tax is an unapportioned, direct and invalid burden on such interstate commerce.

The above points will be covered in the order stated:

1. The tax is on the movement of the property.

As stated by the statute it is a tax on the privilege of "* * * distributing in this state personal property owned by them (in this instance the petitioner) from their own warehouses * * *in this state to their own retail stores or outlets * * *." RCW 82.04.270 (Appendix G, p. 21A). It is a tax solely on the privilege

of moving property between two designated points (while still moving in interstate commerce). The statute renders of no significance what is done by a wholesaler to the property at either point but is simply on the privilege of moving the property regardless of what occurs to or is done with the property before or after reaching the second designated point (bulk plant).

> "Whether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it; * * * The action of the state, as a regulation of interstate commerce, does not depend upon the degree of interference; it is illegal in any degree." *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 at 259 (1922).

2. The interstate commerce transportation did not terminate until (at least) the property reached the bulk plants.

Practically the same facts, but even less favorable to the shipper, were involved in the case of *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1950). No subsequent case has in any way impaired this holding. There this court held that gasoline coming from outside a state remained in interstate commerce notwithstanding storage in bulk for convenience in distribution and sale. The court stated in part:

> "In order for the sales here involved to come under the Clayton Act, as amended by the Robinson-Patman Act, they must have been made in interstate commerce. The Commission and the court

below agree that the sales were so made. 41 FTC 263, 271; 173 F.(2d) 210, 213, 214.

"Facts determining this were found by the Commission as follows: Petitioner is an Indiana corporation, whose principal office is in Chicago. Its gasoline is obtained from fields in Kansas, Oklahoma, Texas and Wyoming. Its refining plant is at Whiting, Indiana. It distributes its products in 14 middle western states, including Michigan. The gasoline sold by it in the Detroit, Michigan area, and involved in this case, is carried for petitioner by tankers on the Great Lakes from Indiana to petitioner's marine terminal at River Rouge, Michigan. Enough gasoline is accumulated there during each navigation season so that a winter's supply is available from the terminal. The gasoline remains for varying periods at the terminal or in nearby bulk storage stations, and while there it is under the ownership of petitioner, and enroute from petioner's refinery in Indiana to its market in Michigan. 'Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and the petitioner's customers' demands could be accurately estimated, so the flow of the stream of commerce kept surging from Whiting to Detroit.' 173 F.(2d) at 213, 214. Gasoline delivered to customers in Detroit, upon individual orders for it, is taken from the gasoline at the terminal in interstate commerce en route for delivery in that area. Such sales are well within the jurisdictional requirement of the Act. * * * Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character."

It will be noted that the terminal storage there involved was for much longer periods than in the facts here under consideration, since the storage was for the purpose of accumulating an entire winter supply for sale so that the storage was necessarily more substantial and more extensive in point of time than in the instant case. As pointed out in the Circuit Court case 173 F. (2d) 210 (which was reviewed by this court in the *Standard Oil Co.* case):

> "* * * It is not disputed that the petitioner is engaged in commerce, but it is vigorously insisted that commerce ended at the River Rouge plant and the bulk plants in the Detroit Area and that the petitioner's transactions from thereon were wholly intrastate. With this we are unable to agree. The break that occurred at River Rouge was a break in transportation but not in the constant stream of commerce that flowed from the Whiting refinery to the petitioner's customers in Michigan. The stream of commerce flowed continuously from the tanks at the refinery to the tankers on the lake; from the tankers to the tanks at River Rouge and the bulk plants in Detroit; and from there into tank cars and tank trucks to the petitioner's customers. There may have been several breaks in transportation in getting from one vehicle or receptacle to the other in completing the commercial transaction of getting the petitioner's gasoline from Whiting (Indiana) into the Detroit territory, but the stream of commerce was never broken, no matter how many receptacles were used on the way. *The rest at River Rouge was not like a warehouse where the goods awaited further sale and distribution.* * * *
>
> "(2) We decline, as the Supreme Court did in

Stafford v. Wallace, supra, 258 U.S. at page 519, 42 S.Ct. at page 403, 66 L.Ed. 735, 23 A.L.R. 229: "* * * to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities, when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." After all, as Justice Holmes said in *Swift & Company v. United States,* 196 U.S. 375, 398, 25 S.Ct. 276, 280, 48 L.Ed. 518, "* * * commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." The modern concept of commerce is one which gives full sweep to the commerce clause of the Constitution within the limits of the implementing statute, a liberal view of the Congressional purpose as expressed in the statute, and a realistic view of what business is doing as it moves across state lines to accomplish its purpose. The late cases support the view that the petitioner's operations are in commerce from the refinery to its customers. *Walling v. Jacksonville Paper Co.,* 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460; *Binderup v. Pathe Exchange,* 263 U.S. 291, 309, 44 S.Ct. 96, 68 L.Ed. 308; *Mid-Continent Petroleum Corporation v. Keen,* 8 Cir. 157 F.(2d) 310, 314; *Republican Pictures Corporation v. Kappler,* 8 Cir. 151 F.(2d) 543, 545, 162 A.L.R. 228; *Walling v. American Stores Co.,* 3 Cir., 133 F.(2d) 840."

It is deemed necessary to quote in full from this case because it demonstrates beyond question, since the facts are so similar (with any differences being in favor of the petitioner herein), that the products here involved

were directly in interstate commerce when the tax on their transportation was levied by the State of Washington.

In *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923) Mr. Justice Sutherland, speaking for this court at page 309, stated:

> "The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an 'interstate' character it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

3. The tax is an invalid burden on interstate commerce.

It is beyond question that a state may not lay a tax on the privilege of engaging in interstate commerce. *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1953), *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923), *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938), *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1938), and that without apportionment as to local activity state taxes on interstate commerce are invalid; *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 314 (1938); *Western Livestock v. Bureau of Revenue*, 303 U.S. 250 (1938); and *Joseph v. Carter and Weekes Stevedoring Co.*, 330 U.S. 422 (1946). A state may not impose a tax which discriminates

against interstate commerce by subjecting it to the burden, or the possibility of the burden of, "multiple taxation," *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1953) and *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938). Such imposition of taxes has been prohibited because the commerce clause precludes what was described in *Freeman v. Hewit*, 329 U.S. 249 (1951), as "one single-tax-worth of direct interference with the free flow of commerce."

As stated in *Michigan-Wisconsin P.L. Co. v. Calvert*, 347 U.S. 157 at 170 (1953):

> "Here it is perhaps sufficient that the privilege taxed, namely the taking of the gas, is not so separate and distinct from interstate transportation as to support the tax. But additional objection is present if the tax be upheld. It would 'permit a multiple burden upon that commerce,' *Joseph v. Carter & Weekes Stevedoring Co., supra* (330 U.S. at 429), for if Texas may impose this 'first taking' tax measured by the total volume of gas so taken then Michigan and the other recipient states have at least equal right to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution. Oklahoma might then seek to tax the first taking of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate. 'The very purpose of the Commerce Clause was to create an area of free trade among the several states. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.' *Mc-*

Lead v. J. E. Dilworth Co., 322 U.S. 327, 330, 331, 88 L.ed. 1304, 1307, 64 S.Ct. 1023, 1030 (1944)."

The basic error of the Supreme Court of the State of Washington, which will be more fully developed in the event this petition is granted, was in completely misconstruing the *Standard Oil Co. v. Federal Trade Commission* case above referred to. In holding that case not applicable and refusing to follow it the court stated:

> "Here, the interstate journey of the petroleum products ends when the products are deposited at the terminal storage plants." (Appendix A, p. 10A).

On the contrary the express and explicit holding of this court was that under facts less favorable to the shipper the interstate journey did not end with the flow into the tank farms and did not end when the gasoline left the tank farms, but continued until final delivery of the gasoline was made (certainly, at least, to the bulk plants). This court adopted the Circuit Court opinion and quoted from it stating:

> "Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and the petitioner's customer's demands could be accurately estimated so that the flow of the stream of commerce kept surging from Whiting (Indiana) to Detroit (which was the delivery point after taking the gasoline from storage at River Rouge, Michigan) 173 F.(2d) at 213, 214." (Parenthetical words supplied)

Certainly no construction can be placed on the foregoing language except that the gasoline in its entire

travel from outside the state through the storage point at the tank farms to the ultimate delivery point at Detroit was in interstate commerce.

This resume of the facts corresponds very closely with the findings of the trial (Superior Court) court in the instant case in which it stated (Appendix K, p. 26A):

> "All of said petroleum products, except as provided in stipulation of April 28, 1959, plaintiff's Exhibit Q, were shipped into the State of Washington in movement from California or other states pursuant to accurately estimated demands for future sales. After storage at terminals the products in question were distributed to Standard's bulk plants for storage and further distribution therefrom. * * * The Tax Commission Assessment and the Tax here in question related to the distribution of petroleum products by Standard from terminal storage plants in this state to such bulk plants in this state."

The petroleum products in question were at all times owned by and at the risk of Standard until they reached the bulk plants and thereafter sold. Since the interstate transportation was continuous through the tank farm storage, the taking of the gasoline from the storage cannot be separated from the transmission of it in interstate commerce. *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1953) quoted above.

Many decisions of this court indicate that it is acutely conscious of the peril to interstate commerce if the right to engage in it is subject to direct state taxation, and it is important therefore that interstate commerce

especially when, as in this case, great volumes of such commerce are concerned, be given by this court its full constitutional protection.

If the decision of the Supreme Court of the State of Washington is allowed to stand in obvious and clear conflict with the ruling in the *Standard Oil Co.* case and the other cases cited herein, a tremendous amount of interstate commerce involving millions of gallons of gasoline will be directly taxed down through the years as well as for the prior period challenged in this case. The distinction which should and must be sustained is drawn from the sentence in the Circuit Court case affirmed by this court wherein the court stated in part:

> "The rest at River Rouge (the original terminal storage point) was not like a warehouse where the goods awaited further sale and distribution."

Finally, it should be noted that while the *Standard Oil Co.* case involved the application of the Robinson-Patman act and not the imposition of a state tax the nature of the applicable statute was totally immaterial. There it was essential to find that the product involved was still "in interstate commerce," and this court did so find. The issue in that case as to whether the product was in interstate commerce was squarely before this court because the petitioner contended that " * * * in the instant case the Congress had limited the commission's jurisdiction to purchases 'in commerce' and did not extend the commission's jurisdiction to purchases 'affecting commerce' * * * —it raises the question whether interstate transportation ended at the marine terminals in Michigan from which no gasoline was ex-

ported to other states.'"[6] This whole line of argument (that the gasoline was not in interstate commerce after storage at River Rouge for the winter) was fully developed by the petitioner in that case,[7] and as noted above was completely rejected by this court, which found the products to be directly in the flow of commerce at all times to and from the marine tank farm to the bulk plants.

CONCLUSION

For the reasons set forth above, petitioner respectfully prays that this petition be granted and a writ of certiorari be issued to review the decision of the court below.

THOMAS TODD
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Seattle 1, Washington

DEWITT WILLIAMS
1440 Washington Building
Seattle 1, Washington
Attorneys for Petitioner

[6] Brief for Petitioner, page 50.

[7] Brief for Petitioner, pages 56-58.

APPENDIX A

OPINION OF SUPREME COURT OF WASHINGTON

156 Wash. Dec. 754
355 P.(2d) 349

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, *Respondent*, vs. THE STATE OF WASHINGTON, *Appellant*. — No. 35304 Department Two

Filed September 22, 1960

The plaintiff in this action seeks to recover certain taxes which it has paid to the defendant state under protest. The taxes were levied and collected under the authority of RCW 82.04.270, which imposes a business and occupation tax upon what are known as "wholesale functions." Insofar as it is applicable in this case, that section provides:

> "(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: *Provided,* That the tax designated in this section may not be assessed twice to the same person for the same article. . . . *Provided further,* That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets. [1959 1st ex. s. c 5 § 3 . . .]"

The plaintiff brings its products into this state by various means of transportation and deposits them at terminal storage plants, from which they are thereafter distributed to some one hundred fifty-two bulk stations or plants within the state. These plants consist of storage and warehouse facilities, with overhead lines for filling trucks, and small offices used by the employees.

During the period involved in this suit, 58.2 per cent of the dollar value of products handled by bulk plants was sold or transferred for resale to retail service stations, dealers, jobbers and cooperatives. The wholesale tax on these transfers was paid without protest.

The remainder of the products were sold at bulk prices and in bulk quantities for business use to industrial, commercial, and agricultural consumers and to government and marine vessels. The prices were determined according to quantity and were influenced by the competitive prices of other suppliers. Very few sales were made at the bulk plants, and customers were not encouraged to visit the plants. Deliveries were made by tank trucks belonging to the defendant, and a sale was considered completed at the time of delivery.

Retail sales taxes, imposed under RCW 82.04.250, were paid on the latter transactions. It was the theory of the tax commission, in levying the taxes in question, that to the extent that retail sales were made from the bulk plants, they were "retail stores or outlets" within the meaning of RCW 82.04.270(2), and that the transfer of the plaintiff's products from its terminals to its bulk plants, to the extent that those products were later sold directly to consumers, was a wholesale function within the meaning of that statute.

In challenging this determination in the superior court, the plaintiff contended that the term "retail sto-

or outlet" was intended to have its common and ordinary meaning, and that establishments which sell in large bulk quantities for business uses do not come within that meaning. The court sustained its position and ordered a refund of the taxes involved.

The legislature has defined the term "retail sale" for purposes of the business and occupation tax statute. RCW 82.04.010 provides:

> "For the purposes of this chapter [which includes RCW 82.04.270] unless otherwise required by the context, the terms used herein shall have the meaning given to them in RCW 82.04.020 through 82.04.210. [1955 c 389 § 2 . . .]"

We then find this definition, RCW 82.04.050:

> "'Sale at retail' or 'retail sale' means every sale of tangible personal property (including articles produced, fabricated, or imprinted) other than a sale to one who (a) purchases for the purpose of resale as tangible personal property in the regular course of business, or (b) installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property, or (c) purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemimal reaction directly through contact with an ingredient of a new article being produced for sale. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82-

.04.280, subsection (2), and 82.04.290 . . . [1959 1st ex. s. c 5 § 2 . . .]."

Further detailed definitions then follow, not pertinent to the issue in the case.

RCW 82.04.060 " 'Sale at wholesale' or 'wholesale sale' means any sale of tangible personal property which is not a sale at retail and means any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers: *Provided,* That the term 'real or personal property' as used in this section shall not include any natural products named in RCW 82.04.100. [1955 1st ex. s. c. 10 § 4 . . .]"

A reading of these statutes in their entirety will show that the legislature was at some pains to insure that a narrow definition of the terms "wholesale sale" and "retail sale" would not be implied, and even went so far as to include labor and services within these definitions. It is also evident that the legislature intended that every sale should be taxed, unless it was expressly excepted from the operation of the statute. Nowhere do we find in this chapter any indication that only stores which sell packaged articles in small quantities for personal use were to be considered "retail stores or outlets." On the contrary, the broadest language is used. The wholesale sales are defined as all sales not classified as retail sales, that is, not sales to consumers, and the wholesale functions tax is imposed "on every person engaged in the business of distributing in this state articles of tangible personal property" (except those expressly excluded) who engage in transactions which would constitute sales at wholesale if a transfer of ownership were involved.

The plaintiff makes some contention that the use of the term "articles" indicates that the legislature had in mind many separate articles or packages such as are distributed by chain-store owners to retail chain stores which deal in merchandise. "Article" is defined in Webster's New Twentieth Century (2d ed.) 1957, Dictionary as "a particular commodity; a thing for sale." A tank of gasoline may be a much larger object than a bottle of hair oil; but we fail to see wherein it is any less an article. We find nothing in the statute to indicate that the legislature intended to make the incidence of the tax dependent on the size of the article sold.

The plaintiff cites cases which have interpreted the Federal fair labor standards act and have defined "retail establishment" for the purposes of that act to exclude from that definition outlets such as are involved in this suit, which sell for business use. It is from these cases that the plaintiff's "ordinary meaning" of the term "retail store or outlet" is derived. However, our statute has given the term "retail sale" a much broader definition, including within it all sales for consumption by the purchaser and making no distinction between business and personal use. If such a distinction were intended, as the plaintiff contends, then stores which sell office supplies, tools, store and office furnishings and the like, would be exempt from the tax whether or not they were chain stores. We find no intention expressed or implied in the statute to allow such exemptions.

The meaning ordinarily given to the term "retail sale," where a taxing statute similar to ours is under consideration, is that which the legislature adopted in this instance—a sale to an ultimate consumer. A few of the recent cases acknowledging the correctness of this definition are *Fritz v. Peck*, 160 Ohio St. 90, 113 N.E.

(2d) 627; *Gay v. Canada Dry Bottling Co. of Fla., Inc.* (Fla.) 59 So.(2d) 788; *Paper Products Co. v. City of Pittsburgh*, 391 Pa. 87, 137 A.(2d) 253; *Market Street Ry. Co. v. California State Board of Equalization*, 137 Cal. App.(2d) 87, 290 P.(2d) 20; and *Trico Electric Cooperative, Inc. v. State Tax Comm.*, 79 Ariz. 293, 288 P.(2d) 782.

It is contended that while the legislature has defined the term "sale at retail," it has not defined the term "retail store," and therefore it must be assumed that the legislative definition of a retail sale was not intended to affect the meaning of the term "retail store or outlet." The plaintiff is unable to point to anything in the context of RCW 82.04.270 (2) which would indicate that the legislature had in mind anything other than a place where retail sales are made. It does not deny that the sales made at its bulk plants were retail sales (sales to consumers—taxable under RCW 82.04.250), but endeavors to persuade the court that they were not made from a retail outlet. We are at a loss to understand what a retail outlet is if it is not a place from which retail sales are made, and are unable to find in the statute any suggestion that the legislature intended another definition.

There is also a suggestion that the majority of the sales were expressly exempted from the tax because they were made from delivery trucks. The statute merely states that such trucks will not be considered retail stores or outlets. They have not been treated as such stores or outlets in this instance. It is, of course, the bulk plants which are found to be retail outlets and not the trucks which they use for delivery.

It is argued that the legislature, in using the phrase "to two or more of its own retail stores or outlets" had in mind that such stores or outlets should be predomi-

nantly used for such sales in order to come within the purview of the statute, and that because 58.2 per cent of the sales from the bulk plants were wholesale sales, the plants could not be classed as retail outlets. The tax is not imposed upon the store or outlet, but upon the wholesaling function, that is, the *distribution* to two or more outlets. We see nothing in the statute to indicate that the legislature intended to restrict the tax to distributions made to establishments which make more retail sales than wholesale sales. Nor do we subscribe to the plaintiff's theory that the intent could not have been to include establishments which make both types of sales because the tax cannot be computed at the moment of distribution. The inability to compute the tax until it is known what proportion of the products have been sold at retail and what proportion at wholesale in no way prevents the ultimate computation and imposition of the tax. A taxpayer cannot relieve himself of his share of the tax burden by simply conducting his business in such a way as to make its computation difficult.

The plaintiff refers to the principle that administrative interpretation of an act is entitled to considerable weight in construing that act, and suggests that an excise tax division's interpretation of a former act, which was repealed in 1939, is persuasive that its operations are not covered by the present act. The former act did not contain the words "or outlet," and the present act has been consistently construed by the commission as applicable to the distributions made to the plaintiff's bulk plants for sale to consumers. If the act were ambiguous and resort to administrative construction were needed in this instance, the latter interpretation is the one which should command the attention of the court.

There are other theories of similar import which are urged, though less earnestly, by the plaintiff in support

of its interpretation of the statute; but we think its attorneys are aware that none of these can survive in the glaring light of the statutory language, and it would serve no useful purpose to prolong this opinion by setting them forth.

Finally, resorting to the rule that a judgment will not be reversed if it can be sustained upon any ground urged before the trial court, the plaintiff proposes that the law in question is forbidden by the United States constitution because it constitutes an undue burden on interstate commerce. The case which it claims to be controlling, is *Standard Oil Co. v. Federal Trade Comm.*, 340 U.S. 231, 95 L.Ed. 239, 71 S.Ct. 240, wherein it was held that temporary storage of oil at dock terminals pending distribution to ultimate customers did not deprive it of its interstate character for purposes of the Robinson-Patman act, regulating price competition. Specifically the court said:

> "Such sales [to jobbers in the Detroit area] are well within the jurisdictional requirements of the Act. Any other conclusion would fall short of the recognized purpose of the Robinson-Patman Act to reach the operations of large interstate businesses in competition with small local concerns. Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character."

It will be seen that the court in that case did not say that the oil had gained no intrastate character, but simply said that it had not been deprived of its interstate character for purposes of the act. It is well settled that an activity may be related to interstate commerce and at the same time be subject to state taxation. The applicable principle is clearly stated in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 98 L.Ed. 583, 74 S.Ct. 396, as follows:

"Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly or by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states. The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received. . . . It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. [citing cases]. And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce."

The court in that case found that the tax in question was imposed on the taking of gas into the pipeline, which activity could not be separated from the transmission of it in interstate commerce. Quoting from *United Fuel Gas Co. v. Hallanan*, 257 U.S. 277, 66 L.Ed. 234, 42 S.Ct. 105, it said:

"'There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line.'"

We think it clear beyond question that the test, when

applied to the activity subjected to taxation in this case, reveals that no undue burden on interstate commerce is imposed. In the last cited case, the tax was imposed upon the movement of the gas into interstate commerce. Here, the interstate journey of the petroleum products ends when the products are deposited at the terminal storage plants. The transfer of these products to bulk plants for distribution to ultimate consumers or retail dealers is not an activity which is duplicated in any other state; therefore no other state can with equal right impose a similar tax. And a practical separation from interstate commerce takes place when the products leave the terminals, if not when they are deposited there. Thereafter they are subject to the taxing power of the state.

The judgment is reversed.

Rosellini, J.

We concur:
Hill, J.
Finley, J.
Hunter, J.
Foster, J.

APPENDIX B

OPINION OF TRIAL COURT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, *Plaintiff*;
vs.
THE STATE OF WASHINGTON, *Defendant*.

No. 30937

MEMORANDUM OPINION

Plaintiff seeks recovery of taxes paid the Tax Commission under the following circumstances. As part of its total distribution system in the State, plaintiff operates terminals or tank farms at Point Wells and East Pasco for the receipt of petroleum products from outside the State and from a refinery within the State. It also operates bulk stations or bulk plants at 152 locations throughout the State supplied by plaintiff from its terminals or other sources. It also operates 3 other terminals which function likewise as bulk plants, known as Seattle Main, Aberdeen and Longview. The tax here questioned was upon that portion of total products passing between terminals and bulk stations, consisting of deliveries to consumers such as government agencies, commercial, agricultural and industrial customers and to vessels. Reference is made to the stipulation of the parties, Exhibit P and the exhibits which are a part of the stipulation, for a statement of the facts in more detail.

The Tax Commission made no findings, conclusion, or order. But it sufficiently appears that they taxed the portion of business hereinbefore described, pursuant to their construction of R.C.W. 82.04.270, the pertinent part of which reads as follows:

"* * * The tax imposed by this section is levied and shall be collected from every person engaged in the business of *distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs*, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: PROVIDED, That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying one-quarter of one percent the value of the article so distributed as of the time of such distribution. The tax commission shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers. PROVIDED FURTHER, That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets." (Emphasis supplied)

The first question presented is one of fact. Is a bulk station a retail store or outlet? The record is replete with proof descriptive of the bulk stations involved here. It includes physical characteristics, personnel employed and their functions, record keeping, operating features, contractual relations, the types of sales made therefrom, promotional activities, and many other matters. It is not all of one tenor, but it fairly preponder-

ates in establishing that these bulk stations are not retail stores or outlets, and we so find.

In Section 4 (d), Chapter 180, Laws of 1935, and in similar context, the legislature used the language "group of retail stores." In 1941 this tax was eliminated. The tax was restored in 1955 as quoted *supra*, and the language used is "retail stores or outlets." The addition of "or outlets" enlarged the category but not the type of thing to which the statute applies. In *Hills v. Joseph*, 229 Fed. 865, it was held the rule of ejusdem generis means that general and specific words capable of an analogous meaning take color from each other, so that the general words are restricted to a sense analogous to the less general. That rule applies here.

The construction put upon the statute by the Tax Commission seems to indicate their determination that bulk stations are retail stores or outlets with respect to the portion of the business taxed, and otherwise as to the remainder. But the statute gives no basis for contending that this was the legislative intent. Moreover, if the legislature so intended it would be simple to express it in appropriate language. The gist of the matter is that the legislature made the character of the facility the determinant of the application of the statute.

The plaintiff will prevail.

Raymond W. Clifford
Judge

16 June, 1959

APPENDIX C

SECTION 12 OF CHARTER 9, LAWS OF WASHINGTON, FIRST EX. SESSION, 1951, PAGES 28 AND 29

Revised Code of Washington 82.32.180

RCW 82.32.180. Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in this chapter, or within thirty days after the date of the notice denying a hearing, or within thirty days after the date of the order provided in RCW 82.32.170. In the appeal the taxpayer shall set forth the amount of the tax imposed upon him which he concedes to be the correct tax and the reason why the tax should be reduced or abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the tax commission within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston county. Within ten days after filing notice of appeal the taxpayer shall file with the clerk of the superior court a good and sufficient surety bond payable to the state in the sum of two hundred dollars, conditioned to diligently prosecute the appeal and pay the state all costs that may be awarded if the appeal of the taxpayer is not sustained.

The trial in the superior court on the appeal shall be de novo and without the necessity of any pleadings other than the notice of appeal. The burden shall rest upon the taxpayer to prove that the tax as paid by him is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the

taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent, relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer. Either party shall be allowed to appeal to the supreme court in the same manner as other civil actions are appealed to that court.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the commission for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

STANDARD OIL COMPANY OF CALIFORNIA, *Plaintiff*, vs. THE STATE OF WASHINGTON, *Defendant*. | No. 30937 **JUDGMENT**

This cause having come regularly for trial before the undersigned Judge of the above Superior Court on the 28th day of April, 1959, the plaintiff appearing by its attorneys, Helsell, Paul, Fetterman, Todd & Hokanson, and the defendant appearing by its attorney, John W. Riley, Assistant Atorney General, and Tidewater Oil Company appearing as amicus curiae by its attorney, DeWitt Williams of Rosling, Williams, Lanza & Kastner, and Union Oil Company appearing as amicus curiae by Griffith Way of Little, LeSourd, Palmer, Scott & Siemmons, and General Petroleum Corporation appearing as amicus curiae by Max Kaminoff of Bogle, Bogle & Gates, and the parties having stipulated as to facts and testimony having been heard and exhibits having been introduced and admitted and statements having been made in open court and the Court having considered all of said evidence and all of the records and files herein and having heard argument of counsel and briefs having been submitted and Findings of Fact and Conclusions of Law having been made, signed and filed herein, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED, as follows:

The plaintiff, Standard Oil Company of California, a corporation, is hereby granted judgment against the defendant, State of Washington, in the amount of $10,-

977.00, and in the additional amount of One Hundred Fifty-three Thousand Five Hundred Twenty-three and 95 100 ($153,523.95) Dollars, with interest on the latter amount at the rate of 3% per annum from July 25, 1958, together with its costs and disbursements herein to be taxed.

DONE IN OPEN COURT this 29th day of June, 1959.

Raymond W. Clifford
Judge

Presented by:
Thomas Todd
of Helsell, Paul, Fetterman, Todd & Hokanson,
Attorneys for Plaintiff.

APPENDIX E

NOTICE OF ORDER DENYING PETITION FOR REHEARING

THE SUPREME COURT, STATE OF WASHINGTON, OLYMPIA

Robert Holstein,
Clerk

Archie B. Stewart,
Deputy Clerk

December 5, 1960

Helsell, Paul, Fetterman, Todd & Hokanson
1112 White Building
Seattle 1, Washington

Hon. John J. O'Connell, Attorney General
Mr. Timothy R. Malone
Temple of Justice
Olympia, Washington

Mr. John W. Riley, Deputy Attorney General
Mr. James A. Furber, Assistant Attorney General
Tax Commission
General Administration Building
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Amici Curiae:

Bogle, Bogle & Gates
Mr. Max Kaminoff
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Seattle 4, Washington

Little, Palmer, Scott & Slemmons
Mr. Kenneth A. Cox
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Seattle 4, Washington

Rosling, Williams, Lanza & Kastner
Mr. DeWitt Williams
1440 Washington Building
Seattle 1, Washington

Standard Oil Company of California
vs. Re—No. 35304—
The State of Washington

Gentlemen:

The Court entered the following order in this cause today:

"The court having considered the petition of the respondent and *amici curiae* for a rehearing herein, the appellant's answer to the petition and the respondent's reply to the answer.

"IT IS ORDERED that the petition for rehearing be and it hereby denied."

Yours very truly,

/s/ Robert Holstein
Robert Holstein, Clerk

RH/lew

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, *Respondent*, vs. THE STATE OF WASHINGTON, *Appellant*.	No. 35304 Thurston County No. 30937 **JUDGMENT**

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 5th day of December, A.D. 1960, on motion of John J. O'Connell, Esquire, of counsel for appellant, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby reversed; and that the said State of Washington have and recover of and from the said Standard Oil Company of California, a corporation, the costs of this action taxed and allowed at Nine hundred sixty-three and 56 100 ($963.56) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

APPENDIX C

SECTION 47 OF CHAPTER 389, LAWS OF WASHINGTON 1955, PAGES 1671, 1672

Revised Code of Washington 82.04.270

RCW 82.04.270. (1) Upon every person except persons taxable under subsection (1) of RCW 82.04.260 engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one percent.

(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: Provided, That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying one-quarter of one percent the value of the article so distributed as of the time of such distribution: Provided, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The tax commissioner shall

prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: Provided further, That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets.

APPENDIX H

Excerpts from Respondent's Brief to the Supreme Court of Washington, pp. 6 and 8

"Thus Standard accumulates petroleum products in the State of Washington at its 'terminals' or tank farms (Ex. P, St. 161; Findings of Fact Tr. 12-18).

"Respondent's terminals are supplied by ocean going tankers, rail, interstate pipelines, trucks and river barges (St. 161, Ex. P; see also Illustration No. 2, *infra*).

"From its terminals inside the State of Washington respondent next distributes its products to its bulk stations which are located throughout the State of Washington (Ex. P, St. 161). Respondent owns and operates 152 such 'bulk stations' located throughout the State of Washington (Ex. P-11, St. 161) * * *

"1. Terminals are 'warehouses or other central locations' (RCW 82.04.270) supplied by various transportation media from *points outside Washington*" (emphasis supplied).

APPENDIX I

Excerpts from Petitioners' Notice of Appeal and Complaint to the Superior Court of the State of Washington for Thurston County, Cause No. 30937.

"(g) A large portion of the petroleum products transported by plaintiff from said terminal storage plants to the wholesale distributor plants was manufactured or acquired by plaintiff at points outside of the State of Washington and while being transported to said terminal storage plants, to said wholesale distributor plants, and to plaintiff's customers were in interstate commerce. Section 47 of Chap. 389 of the Laws of 1955 as applied by the State Tax Commission of the State of Washington is unconstitutional and void because it imposes a direct burden on and discriminates against interstate commerce in violation of Article I, Section 8 of the Constitution of the United States."

APPENDIX J

Rule 50, Rules on Appeal of Supreme Court of Washington

Revised Code of Washington, Vol. 0, p. 28

Any party to an appealed case may, after an opinion has been filed, present to the court, in the manner and time as hereinafter provided, a petition for rehearing.

Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed. No more than one petition shall be filed by the same party. The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined.

When a rehearing is granted, the clerk shall notify counsel for the respective parties thereof.

When an answer to a petition for rehearing is called for by the court, the clerk shall mail to the attorney of the party from whom the answer is required a copy of the original petition, with a request that he file an answer thereto within fifteen days and serve a copy thereof on opposing counsel.

Three copies each of the petition for rehearing and of the answer thereto, if called for, shall be filed with the clerk

Petitions for rehearing and answers thereto may be printed, mimeographed, or typewritten. If a petition for rehearing be granted, the court may require additional copies of the petition, answer and briefs to be supplied in the manner indicated by the court. (Adopted November 22, 1950; Amended November 17, 1952.)

APPENDIX K

Excerpts from Findings of the Trial Court, Superior Court of the State of Washington for Thurston County

III

"Standard during the period covered by the assessment in question engaged in the distribution and sale of petroleum products in the State of Washington. All of said petroleum products except as provided in Stipulation of April 28, 1959, plaintiff's Exhibit Q, were shipped into the State of Washington in movement from California or other states pursuant to accurately estimated demands for future sales. After storage at terminals the products in question were distributed to Standard's bulk plants for storage and further distribution therefrom. Standard, during the period in question, owned and operated terminal storage plants or tank farms, which are major receiving points with large storage facilities and which received petroleum products directly from outside Washington. * * *

IV

"The Tax Commission Assessment and the Tax here in question related to the distribution of petroleum products by Standard from terminal storage plants in this state to such bulk plants in this state to the extent that such products were later delivered from such bulk plants to consumers such as government agencies, commercial, agricultural and industrial customers and to vessels. * * * "

VI

"The petroleum products in question were at all times owned by and at the risk of Standard until they were sold for resale or until they reached the ultimate consumer. * * * "

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 730

STANDARD OIL COMPANY OF CALIFORNIA,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. O'CONNELL,

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Attorneys for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 780

STANDARD OIL COMPANY OF CALIFORNIA, *Petitioner*,

v.

THE STATE OF WASHINGTON, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATUTES INVOLVED

The petitioner has failed to cite the key Washington statute involved in this case which *imposes* the tax to which petitioner objects.

The omitted statute, which determines, at least nominally, the legal incidence of taxation, provides that:

> "There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be." (RCW 82.04.220[1])

The only portion of the applicable excise tax act cited by petitioner is section 82.04.270 which establishes the classification of business activities under which petitioner's operations fell during the audit periods in question in this case.[2]

Petitioner would have it appear that the tax falls upon transportation and, in turn, interstate commerce, while the facts and the law of this case are that the incidence of taxation is upon the "privilege of engaging in business activities" in the state of Washington. (RCW 82.04.220)

Thus RCW 82.04.220 imposes a tax upon *every* person "engaging in business activities" within the state of Washington. In turn, RCW 82.04.150 defines "engaging in business" as:

> "* * * commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business."

---

[1]Revised Code of Washington, or "RCW".

[2]Appendix A sets forth in seriatim the imposing section (RCW 82.04.220, *supra*) together with applicable statutory definitions of the same chapter.

The tax is *measured* by the application of applicable rates against "the value of products, gross proceeds of sales, or gross income of the business": in this case by RCW 82.04.270(2).

Other portions of this chapter of the Revised Code of Washington establish classifications of business activities subjected to taxation by the same section which imposes the tax on petitioner's business activities in this case.[1]

RCW 82.04.270 defines the classifications of business activities engaged in by petitioner which are subject to the tax imposed by RCW 82.04.120, and for which the petitioner was assessed taxes in this case. Thus:

> "(1) Upon every person except persons taxable under subsection (1) of RCW 82.04-.260 engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one percent.
>
> "(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the

[1]See Appendix B.

wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: *Provided*, That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying one-quarter of one percent the value of the article so distributed as of the time of such distribution: *Provided*, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The tax commission shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers. * * *"

It will be noted that RCW 82.04.270 is primarily directed to wholesalers, and imposes a business and occupation tax upon the privilege of engaging in the business activity of making wholesale sales within the state of Washington. In this case, however, the petitioner's business activities here in question fall clearly under the statutory classification of the second section of RCW 82.04.270. Petitioner paid with-

out protest its taxes that were assessed for business activities within RCW 82.04.270(1).

This court may take judicial notice of the fact that the second section of RCW 82.04.270 has the effect of a compensating tax and is obviously designed to place large integrated business activities (like Standard Oil Company of California) which accomplish wholesaling within their own business organization on a par with "independent" competing business activities that are not so vertically integrated.[1]

Thus, the legislature has declared that the purpose of subsection (2) of RCW 82.04.270 is " * * * to impose a tax equal to the wholesaler's tax upon persons *performing functions* essentially comparable to those of a wholesaler, but not actually making sales." (Emphasis supplied.)

II

QUESTIONS PRESENTED FOR REVIEW

Respondent does not concede that there is a legitimate federal question presented to this court

---

[1]Obviously independent business activities falling under RCW 82.04.270(1) (wholesalers) would pay a wholesaler's business and occupation tax for the privilege of engaging in such business activities. Persons engaging in retailing business activities in the state of Washington would likewise pay a business and occupation tax for the privilege of engaging in that particular classification of business activity. Since the measure of taxation is in each case the gross receipts from sale of products by the wholesaler and retailer, an advantage over the independent business would be gained by large integrated competitors like Standard Oil Company of California who are able to conduct integrated merchandising activities from the manufacturing to wholesaling and thence to retailing, but for the classification of business activities accomplished by subsection (2) of RCW 82.04.270.

for review. Petitioner approaches this court assuming that the incidence of the tax is "upon transportation." Petitioner has not justified, and cannot justify, this assumption.

Thus the question put to this court is not, as suggested by petitioner, "whether the tax involved was unconstitutional as applied to transportation of petroleum products," since by no legal test in existence can this court conclude that the tax is a "tax upon transportation."

Before we accept even for purposes of argument the thesis of the petition, this court must first determine what is the legal incidence of taxation involved in this case: It should then determine whether the petitioner's business activities are even remotely related to interstate commerce: Even if both of the foregoing are resolved contrary to respondent's position set forth below, petitioner's case becomes at best a question of *whether the statutes in question, as applied to its business activities within the state of Washington, result in an unreasonable burden upon interstate commerce.*

III

COUNTERSTATEMENT OF THE CASE

A. The Statute Imposes a Tax Upon "Business Activities" Conducted Entirely Within the State of Washington.

Throughout its Petition, the petitioner has obfuscated the true nature of the tax in question. It

has repeatedly asserted that the tax amounts to an impost upon interstate commerce. It is aided in its desire to reach this conclusion by a mysterious process of transposition of terms; thus, it takes the phrase "distribution of products" from the classification section of the act (RCW 82.04.270(2)) and substitutes the word "transporting." The phrase "distribution of products from a warehouse or other central location to two or more of its own retail stores or outlets * * *" then becomes "transportation of products from a warehouse or other central location to two or more of its own retail stores or outlets * * *" and petitioner then draws the conclusion that the taxable incidence is borne directly by "interstate commerce."

B. PRODUCTS INVOLVED IN PETITIONER'S BUSINESS ACTIVITIES HAD COME TO REST BEFORE TAXABLE EVENT OCCURRED.

We repeat, however, that this tactic ignores both the imposing section of the statute and the facts of the case which were clearly established at the trial and were correctly summarized in the Washington Supreme Court's opinion of the matter. Now, the fact is that the classification in question might have been stated to require a business and occupation tax for the privilege of engaging in the transportation business within the state of Washington. But that is not the law and it is not in accord with the facts. Petitioner is not in the transportation business—it

is in the business of wholesaling and wholesale distribution of products which it manufactures for sale. In any event, the trial court's findings of fact completely eliminate any question as to whether the petitioner's products were moving in interstate commerce when the transactions constituting the privileged "business activity" took place, even if we were to assume that the tax was intended to tax petitioner's engagement in transportation activities.

Thus the trial court found affirmatively that the petroleum products which were involved in the business activities subject to the business and occupation excise tax were placed in *storage* within the state of Washington before the business activities that were subjected to taxation here were undertaken. The trial court actually struck in pen and ink from petitioner's proposed findings of fact the term "continuous" from the phrase "continuous movement," and the word "temporary" from the phrase "temporary storage." (See Finding of Fact No. 5, Tr. 12-18.) The trial court also struck in pen and ink the whole of petitioner's proposed Conclusion of Law No. 5 which petitioner had urged to the trial court in support of its contention that the products were in the course of interstate commerce at the time the business activities involving them were commenced.

Thus it is hoped that this court will bear in mind that the trial court considered that the products involved in the business activities subject to this tax had come to rest within Washington.

C. TRANSPORTATION WAS ONLY INCIDENTAL TO PETITIONER'S BUSINESS ACTIVITIES WHICH WERE SUBJECTED TO TAXATION.

An examination of the record will disclose that the state of Washington went to great pains during the trial of this matter and during the process of taxation to exclude from the tax base the proceeds of any business transactions which involved products which had not come entirely to rest within the state of Washington. To illustrate this fact, reference to Appendix C (which was set forth in the respondent's brief to the Washington State Supreme Court, at page 9 of its brief) will illustrate the ordinary flow of the petitioner's manufactured products utilized at the various stages of its highly integrated business and merchandising empire. As illustrated, all of Standard's products were accumulated at tank farms within the state of Washington before any of its subsequent business activities were assessed taxes in support of the government of the state of Washington.

Thus petitioner's business activities subjected to the Washington business and occupation tax which are involved in this case are confined solely and entirely to "wholesaling functions" conducted entirely within the state *subsequent* to the accumulation and storage of products at the petitioner's tank farms *within the state of Washington.*

D. PETITIONER'S BUSINESS ACTIVITY IS MERCHANDISING (WHOLESALING AND WHOLESALE FUNCTIONS).

As explained by the author of the Washington State Supreme Court opinion in this matter:

> "During the period involved in this suit, 58.2 per cent of the dollar value of products handled by bulk plants was sold or transferred for resale to retail service stations, dealers, jobbers and cooperatives. The wholesale tax on these transfers was paid without protest.
>
> "The remainder of the products were sold at bulk prices and in bulk quantities for business use to industrial, commercial, and agricultural consumers and to government and marine vessels. The prices were determined according to quantity and were influenced by the competitive prices of other suppliers. * * *
>
> "Retail sales taxes, imposed under RCW 82.04.250, were paid on the latter transactions. It was the theory of the tax commission, in levying the taxes in question, that to the extent that retail sales were made from the bulk plants, they were 'retail stores or outlets' within the meaning of RCW 82.04.270(2), and that the transfer of the plaintiff's products from its terminals to its bulk plants, to the extent that those products were later sold directly to consumers, was a *wholesale function within the meaning of that statute.*" (Emphasis supplied.) *Standard Oil Co. of California v. The State of Washington*, 156 Wash. Dec. 754, 355 P. (2d) 349, at 756.

In other words, the tax fell upon petitioner as a direct consequence of its exercise of its corporate franchise *within* the state of Washington. The particular business activities in question here are defined as "wholesale functions." Transportation of the merchandise involved in these business activities was only indirectly involved. And even so, it was entirely *intra*-state.

It is submitted that interstate commerce is no more involved in this case than it is in the process of movement of a can of beans from a grocer's shelf to the kitchen table.

IV

ARGUMENT

A. Respondent's Argument in Opposition to Petition for Writ of Certiorari.

1. No Burden on Interstate Commerce: Petitioner's Activities Are Entirely Local.

We think that the author of the Washington State Supreme Court decision in this matter correctly concluded that it is " * * * clear beyond question that the test, when applied to the activities subjected to taxation in this case reveals that no undue burden on interstate commerce is imposed." For "a practical separation from interstate commerce takes place when the products leave the terminals, if not when they are deposited there. Thereafter they are subject to the taxing power of the state." *Standard Oil Company of California v. The State of Washington, supra,* at 763.

And this postion has been sustained in recent cases presented to this court. See *B. F. Goodrich Co. v. State*, 38 Wn. (2d) 663, 231 P. (2d) 325 (1951), cert. denied, 342 U. S. 876; *Field Enterprises v. State*, 47 Wn. (2d) 852, 289 P. (2d) 1010 (1955), affirmed *per curiam*, 352 U. S. 806; *United States Steel Corporation v. State*, 51 Wn. (2d) 224, 316 P. (2d) 1099 (1957), dismissed for want of substantial federal question, 358 U. S. 46; *Crown Zellerbach Corporation v. State*, 53 Wn. (2d) 813, 328 P. (2d) 884 (1958), dismissed for want of substantial federal question, 359 U. S. 531.

For examples of factual-legal situations in which this court held that the Washington business and occupation tax may result in an impost upon commerce, we have *Fishers Blend Station v. Tax Commission*, 297 U. S. 650, 80 L. ed. 956, 56 S. Ct. 608 (1936); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 82 L. ed. 68, 58 S. Ct. 72 (1937); *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 83 L. ed. 272, 59 S. Ct. 325 (1939). Not even the petitioner has suggested that the foregoing cases are similar factually or legally to the case now at bar. On the other hand we do have the benefit of this court's review of four recent cases applying the same Washington business and occupation tax to the local business activities of large interstate concerns. In each case the taxpayer's business activities necessarily hinged upon the sale of products moving in interstate commerce. In each case this court sus-

tained the Supreme Court of the State of Washington or refused to grant a writ of certiorari. In each case the Washington Supreme Court had concluded that the business and occupation tax fell upon a purely local incidence of taxation. *B. F. Goodrich Co. v. State, supra; Field Enterprises v. State, supra; United States Steel Corporation v. State, supra; Crown Zellerbach Corporation v. State, supra.*

In the *United States Steel* case, *supra*, the appellant demanded that the Washington excise tax on wholesaling in Washington be apportioned so as to exclude products sold to Washington purchasers and delivered to them from points outside Washington via interstate carriers. The Washington Supreme Court (whose action was later upheld by this court) refused to do so, saying:

> "Appellant argues that the tax should be apportioned between interstate and local activities. There is no question of apportionment here. The tax is measured solely by appellant's local *wholesale and retail activities.* No part of the tax is attributable to its manufacturing or other out-of-state activities. The sales are negotiated within the state of Washington, and the fact that delivery is made direct to the purchaser does not change the nature of the local transaction. *Norton Co. v. Department of Revenue of Illinois*, 340 U. S. 534, 95 L. Ed. 517, 71 S. Ct. 377; *Field Enterprises v. State, supra.*" *United States Steel Corporation v. State, supra*, at 226. (Emphasis supplied.)

This court granted the state's motion to dismiss. The parallel between that case and this is obvious. In this case, the tax is measured solely by the value of products involved in purely local activities. Indeed, this case offers the further fact that here the products involved in the business activities subjected to taxation moved between two points entirely within the taxing jurisdiction.

To the same effect and in the same manner, this court granted the respondent's motion to dismiss the appeal from the decision of the Washington Supreme Court in *Crown Zellerbach Corporation v. State of Washington, supra,* holding that a tax imposed upon the privilege of manufacturing may be measured without apportionment of the proceeds of sale on the basis of the place of sale when a substantial volume of the products so manufactured was designated for shipment outside the state of Washington.

2. The Washington Tax Cannot Be Duplicated Elsewhere.

The Washington Supreme Court recognized the multiple burdens test in its denial of the petitioner's claim that the wholesaling functions tax in question constituted an impost upon interstate commerce. The Washington Supreme Court stated that:

> "* * * The transfer of these products to bulk plants for distribution to ultimate consumers or retail dealers is not an activity which is duplicated in any other state; therefore no other state can with equal right impose a similar tax." *Standard Oil Company of California v. State, supra,* at 763.

The declaration of this court in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546 (1938), seems apropos, if it is not dispositive of the petitioner's contention:

> "As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. *Cf. Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, *ante*, 68, 58 S. Ct. 72. No one would doubt that the tax on the privilege would be valid if it were measured by the amount of advertising space sold. *Utah Power & L. Co. v. Pfost*, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548, *supra*; *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17, 78 L. ed. 622, 54 S. Ct. 267, or by its value. *Oliver Iron Min. Co. v. Lord*, 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526; *Hope Natural Gas Co. v. Hall*, 274 U. S. 284, 71 L. ed. 1049, 47 S. Ct. 639. Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. * * *" 303 U. S. 250, 258.
>
> "* * * All the events upon which the tax is conditioned — the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any

control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent." 303 U.S. 260.

3. A Reasonable Non-discriminatory Tax May Incidentally Impinge Upon Products in Interstate Commerce.

If we were to assume for the moment that the tax was a direct tax upon the products rather than upon the privilege of engaging in business in the state of Washington, the tax is not *ipso facto* incompatible with the federal commerce clause.

In the decision from which the petition is here taken, the Washington Supreme Court gave full cognizance to the decisions of this supreme court establishing this proposition observing that:

"* * * It is well settled that an activity may be related to interstate commerce and at the same time be subject to state taxation. [Citing *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 98 L. ed. 583, 74 S. Ct. 396.]"

"* * * a tax upon such intrastate activities as the sale, withdrawal, or distribution of a commodity moving in interstate commerce, after it has come to rest in the taxing state and its interstate voyage has ended, whether or not it remains in the original package, does not violate the interstate commerce clause so long as

there is no discrimination against the commodity because of its origin in another state. *Eastern Air Transport v. South Carolina Tax Commission*, 285 U. S. 147, 76 L. Ed. 673, 52 S. Ct. 340; *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249, 77 L. Ed. 730, 53 S. Ct. 345, 87 A. L. R. 1191; *Edelman v. Boeing Air Transport*, 289 U. S. 249, 77 L. Ed. 1155, 53 S. Ct. 591; *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 78 L. Ed. 1141, 54 S. Ct. 575; *Henneford v. Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814, 57 S. Ct. 524; and *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 84 L. Ed. 565, 60 S. Ct. 388, 128 A. L. R. 876." *Texas Company v. Cohn*, 8 Wn. (2d) 360, 112 P. (2d) 522, at 389.

Many other commerce clause cases of this court sustain the foregoing principle. See *Hump Hairpin Mfg. Co. v. Emmerson*, 258 U. S. 290, 66 L. ed. 622, 42 S. Ct. 305 (1922); *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 95 L. ed. 573, 71 S. Ct. 503 (1951); *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913 (1938); *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522 (1919); *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546 (1938), *supra*.

As stated in the *Hump Hairpin Mfg.* case, *supra*: "The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon,

it, or whether it affects only incidentally or remotely. * * *"

Similarly as stated in *Henneford v. Silas Mason Co.*, 300 U. S. 577, 81 L. ed. 814, 57 S. Ct. 524, at 81?:

> "Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. * * *"

B. REBUTTAL OF PETITIONER'S ARGUMENT.

The focal point of the petitioner's whole plea to this court, as it was before the trial court and as it was before the Washington State Supreme Court, with respect to the federal commerce clause question is whether *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, 95 L. ed. 239, 71 S. Ct. 240 (1951), would preclude the imposition of the tax in question. Is the doctrine of *Standard Oil v. Federal Trade Commission*, *supra*, in any way in conflict with any of the authorities cited by respondent? The answer is *No!*

1. **Standard Oil Co. v. Federal Trade Commission.**

As indicated above, we think it is so clear that the case of *Standard Oil Co. v. Federal Trade Commission*, *supra*, is so far distinguishable from the case at bar that there is little doubt that the petitioner has failed to state a federal question.

The case is to be distinguished on several counts, not the least of which is the fact that this court was

there concerned solely with the question of whether or not the Federal Trade Commission's jurisdiction for the purposes of the Clayton Act, as amended by the Robinson-Patman Act, extended beyond the point of storage of products destined for further distribution within the state of Michigan.

Again the Washington State Supreme Court succinctly stated this court's holding of the case in concluding that the U. S. Supreme Court

> "* * * did not say that the oil had gained *no* intrastate character, but simply said that it had not been deprived of its interstate character for purposes of the act [Robinson-Patman Act]. It is well settled that an activity may be related to interstate commerce and at the same time be subject to state taxation. The applicable principle is clearly stated in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396, as follows:
>
> "'* * * Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly or by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states. The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in

> return for benefits received. * * * It is *now well-settled that a tax imposed* on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. [citing cases]. And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce.'" *Standard Oil Co. v. State, supra,* at 762. (Emphasis supplied.)

2. Petitioner's Commerce Clause Argument Is Based Upon a False Premise.

Observe that the petitioner's whole commerce clause argument, which argument mistakenly assumes that the product is still in interstate commerce when distributed from terminal tank farms to the bulk stations, is based upon the proposition that if the product is still in interstate commerce for purposes of Congressional regulatory power, that product, therefore, is beyond the pale of state taxing power. This proposition is patently false. Mr. Justice Frankfurter took great pains to lay this error to rest in *Central Greyhound Lines v. Mealey,* 334 U. S. 653, 92 L. ed. 1633, 68 S. Ct. 1260 (1948) at page 1637, which held that New York could tax certain transportation activities which were concededly

within the regulatory power of Congress, when he said that:

> "This case serves to remind once more that courts do not adjudicate abstractions, such as, 'What is interstate commerce?' Also, it again illustrates that even if it be found that certain transactions in fact constitute interstate commerce, such conclusion does not answer the further inquiry whether a particular assertion of power by a State over such transactions offends the Commerce Clause."

3. Michigan-Wisconsin Pipe Line Co. v. Calvert.

The petitioner would rely upon the rule of the *Michigan-Wisconsin Pipe Line, supra*, discussed in the opinion of the Washington State Supreme Court from which petitioner seeks relief. (Pet. p. 17 *et seq.*) We urge the court to examine carefully the holding in *Michigan-Wisconsin Pipe Line Co. v. Calvert, supra*, for the holding of that case is actually in harmony with respondent's theory of this case, ever though the case is distinguishable, factually.

The taxing incidence there was the act of taking goods already produced, gathered and processed by others *for transmission through interstate pipelines.* In condemning the tax in that case, this court declared that the "taking" in question was solely "for interstate transmission and the commodity at that time is not only actually committed to, but is moving in interstate commerce."

Obviously from the facts of the case at bar the incidence of taxation here is not a single act of "tak-

ing," but is instead the integrated process of "engaging in business activities within the state of Washington." And the products involved in the petitioner's business activities in this case were not committed to interstate commerce, but had in fact reached their destination and had been placed in storage before the commencement of petitioner's business activities which were taxed in this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

APPENDIX A

Provisions of the Revised Code of Washington Applied to the Petitioner

RCW 82.04.220 There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

RCW 82.04.296 From and after the first day of May, 1955, there is levied and shall be collected from every person for the act or privilege of engaging in business activities, as a part of the tax imposed by this chapter, other than those activities taxed pursuant to RCW 82.04.260, an additional tax in the amount of sixty percent of the tax payable under this chapter: *Provided*, That from April 1, 1959 until July 1, 1961 the additional tax imposed under this section shall be in the amount of seventy-six percent of the tax payable under this chapter. To facilitate collection of this additional tax, the tax commission is authorized to adjust the basic rates of persons to which this section applies in such manner as to reflect the exact amount of the additional tax hereby imposed.

Definitions

RCW 82.04.030 "Person" or "c o m p a n y," herein used interchangeably, means any individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, com-

pany, joint-stock company, business trust, municipal corporation, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal; nonprofit, or otherwise and the United States or any instrumentality thereof.

RCW 82.04.040 "Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.04.050. It includes renting or leasing conditional sale contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It also includes the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

"Casual or isolated sale" means a sale made by a person who is not engaged in the business of selling the type of property involved.

RCW 82.04.060 "Sale at wholesale" or "wholesale sale" means any sale of tangible personal property which is not a sale at retail and means any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers: *Provided*, That the term "real or personal property" as used in this section

shall not include any natural products named in RCW 82.04.100.

RCW 82.04.070 "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

RCW 82.04.140 "Business" includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.

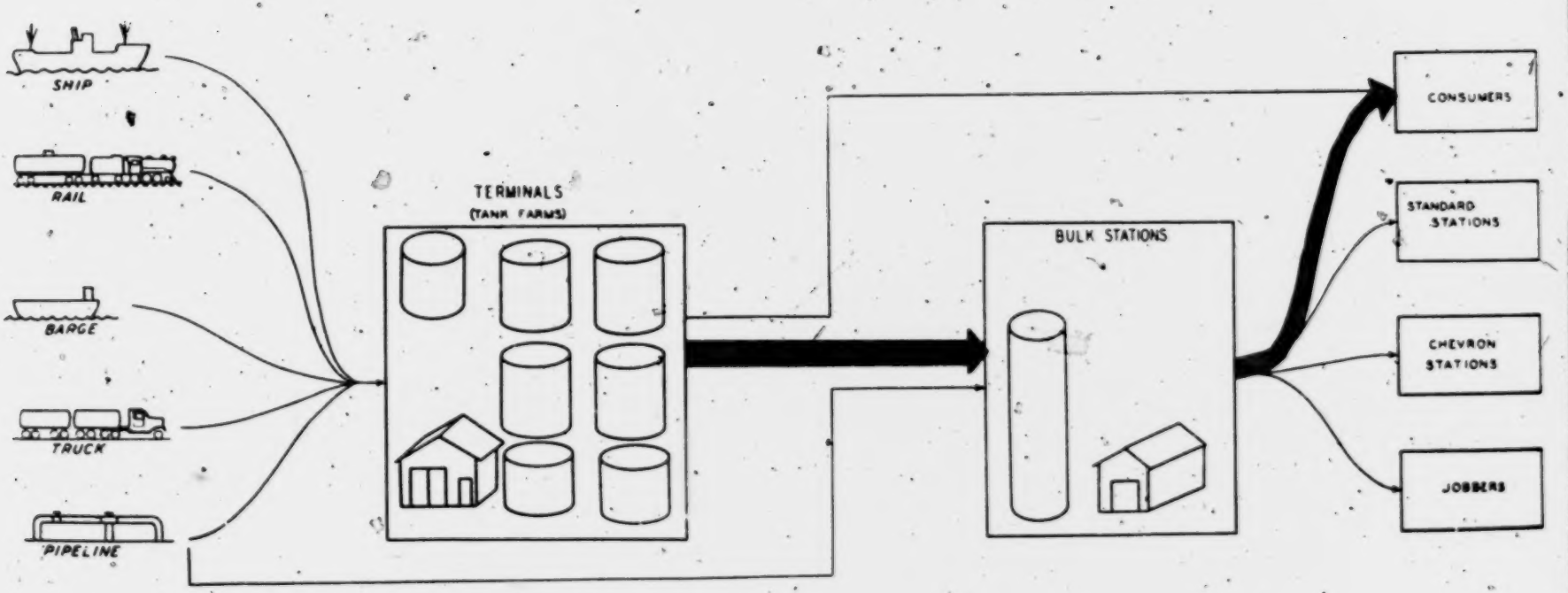
RCW 82.04.150 "Engaging in business" means commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business.

APPENDIX B

Statutory Classifications of Other "Business Activities" Subject to Washington Business and Occupation Tax

RCW 82.04.230	(Extractors)
RCW 82.04.240	(Manufacturers)
RCW 82.04.250	(Retailers)
RCW 82.04.260	(Wholesalers of Wheat, Oats, Corn, Barley — Flour Millers — Seafood Products)
RCW 82.04.275	(Wholesale Sales of Cigarettes)
RCW 82.04.280	(Printers and Publishers — Public Road Contractors — Extractors and Processors for Hire — Cold Storage Warehousemen — Lessors)
RCW 82.04.290	(Service and Other Activities).

ILLUSTRATION NO. 1.



Petitioners Petroleum Marketing System in Washington.

APPENDIX C

Key to Illustration No. 1

1. Terminals are "warehouses or other central locations" (RCW 82.04.270), supplied by various transportation media from points outside Washington.
2. Bulk stations further sell or distribute petitioner's petroleum products to
   (a) Retail consumers (for purposes other than resale);
   (b) Standard stations (for resale);
   (c) Chevron stations (for resale);
   (d) Jobbers (for resale).
3. The legal incidence of taxation here is the privilege of engaging in "business activities" in the state of Washington (RCW 82.04.220), to-wit (RCW 82.04.270 (2), *supra*):

   "* * * upon every person engaged in the business of distributing in this state articles of tangible personal property * * * the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales. * * *"
4. Only the products distributed from terminal to bulk station and in turn sold to consumers (heavy-type arrows) is included in the tax base.
5. Illustration No. 1 is based upon respondent's Exhibit M (St. 159).